Supreme Court, U.S.
FILED
JUN 9 1993
OFFICE OF THE CLERK

No. 92-1684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

JOHN R. WORTHINGTON
DONALD J. ELARDO
FRANK W. KROGH
MCI TELECOMMUNICATIONS CORPORATION
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 872-1600

CHESTER T. KAMIN
MICHAEL H. SALSBURY *
ANTHONY C. EPSTEIN
DONALD B. VERRILLI, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for MCI Telecommunications Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
I. THE LEGAL AND PRACTICAL IMPORTANCE OF THE ISSUES PRESENTED IN THIS CASE ARE NOT IN DISPUTE	1
II. THIS COURT SHOULD NOT DEFER CONSIDERATION OF THESE SUBSTANTIAL QUESTIONS TO A FUTURE CASE	2
III. AT&T'S DEFENSE OF THE APPEALS COURT'S RULING CANNOT WITHSTAND SCRUTINY	5
IV. THE ADMINISTRATIVE LAW ISSUE PRESENTED IN THE PETITION ALSO MERITS REVIEW	10
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

American Telephone and Telegraph Company v. F.C.C., 503 F.2d 612 (2d Cir. 1974) 8
Chevron U.S.A. Inc. v. Natural Resources Defe se Council, Inc., 467 U.S. 837 (1984) 5
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 3
Maislin Industries U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 7
National R.R. Passenger Corp. v. Boston and Maine Corp., 112 S. Ct. 1394 (1992) 5, 6
Pauley v. Bethenergy Mines Inc., 111 S. Ct. 2524 (1991) 5
Pension Benefit Guarantee Corp. v. LTV Corp., 496 U.S. 633 (1990) 5
Sullivan v. Everhart, 494 U.S. 83 (1990) 6

Statutes

47 U.S.C. § 203 ..... *passim*
47 U.S.C. § 226(i) 9
49 U.S.C. §§ 10762(a) (1) and 10761(a) 8
49 U.S.C. § 10762(d) (1) 7

Miscellaneous

November 25th Report and Order, 7 F.C.C. Rcd 8072 (1992) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1684

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

The briefs in opposition submitted by the United States and AT&T—as well as critical developments in the past few days—confirm the need for plenary review.

I. THE LEGAL AND PRACTICAL IMPORTANCE OF THE ISSUES PRESENTED IN THIS CASE ARE NOT IN DISPUTE

No party disputes the importance of the issues raised by this case. The United States concedes that the first question presented in MCI's petition for certiorari "involves a matter of substantial importance." [1] Brief for the Federal Respondents in Opposition, at 10. The United States also agrees that "the court of appeals' rejection of the Commission's permissive tariffing rules is a matter

---

[1] MCI's petition for certiorari described the Commission rule set forth in the *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983), as the "permissive detariffing rule." Because respondents have

of substantial concern" because "the rules represent a 'cornerstone' of its regulation of the long-distance industry, and their removal is likely to have an adverse and anticompetitive impact on many providers of telecommunications services and their customers." *Id.* at 11. Nor does AT&T dispute that invalidation of the FCC's permissive tariffing rule will require wrenching and destructive changes in the long-distance industry, which has been governed by that rule for a decade. Indeed, AT&T is pursuing this case precisely because it hopes to exploit the anticompetitive potential created by invalidation of this "cornerstone" of the Commission's regulatory structure.

II. THIS COURT SHOULD NOT DEFER CONSIDERATION OF THESE SUBSTANTIAL QUESTIONS TO A FUTURE CASE

The United States opposed plenary review solely on the ground that the "matter of substantial importance" presented in MCI's petition might be better addressed upon review of another decision from the D.C. Circuit—the same court that issued the decision at issue in the instant petition. In particular, the United States urged that this Court await the D.C. Circuit's ruling on AT&T's challenge to the Commission's *November 25th Report and Order*,[2] which reaffirms the Commission's commitment to the permissive tariffing rule.

That objection to review no longer has any force. On June 4, 1993, the D.C. Circuit summarily reversed the Commission's *November 25th Report and Order*. The substance of the panel opinion consisted entirely of the following:

> Upon consideration of [AT&T's] motion for summary decision, the opposition thereto and the reply, it is

---

characterized it as the "permissive tariffing rule," MCI will adopt that characterization in this reply.

[2] 7 F.C.C. Rcd 8072 (1992).

> ORDERED that the motion be granted and the order of the Federal Communications Commission (FCC) be summarily reversed. The merits of the parties' positions are so clear as to warrant summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1774 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The decision of this court in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), conclusively determined that the FCC's authorization of permissive detariffing violates section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1998).

Order, *American Tel & Tel. Co. v. Federal Communications Comm'n*, No. 92-1628 (D.C. Cir. June 4, 1993) (reprinted as an appendix to this reply). There is thus no need to await further action by the D.C. Circuit. Nor should the Court defer consideration until plenary review is sought with respect to this new ruling, for two reasons.

First, the critical legal issue—whether the statutory language in Section 203(b) empowering the Commission to "modify any requirement" of Section 203 justifies the permissive tariffing rule—is a pure question of statutory interpretation that was squarely decided by the Court of Appeals. As in any *Chevron* case, the Court in this case must "look to the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), to determine whether the ordinary meaning of Section 203 can reasonably bear the interpretation advanced by the Commission. To the extent the Commission's *November 25th Report and Order* bears upon that question of statutory interpretation, it is available to this Court. *See* Pet. App. 33a-66a.

Second, there is an immediate need to end the serious real-world harms that have followed upon the D.C. Circuit's invalidation of the *Fourth Report and Order*.

On June 8, 1993, AT&T filed an action in the District Court for the District of Columbia seeking an emergency injunction prohibiting MCI from providing service to major national accounts—including Chrysler Corp., Citibank, K Mart Corp. and Bank of America—based on the Court of Appeals' interpretation of Section 203. Previously, AT&T unleashed a barrage of litigation seeking massive damages against MCI, Sprint, and another major competitor for alleged violations of Section 203.[3] AT&T has threatened similar suits against some or all of the more than four hundred smaller non-dominant carriers who provided nontariffed services in conformity with the *Fourth Report and Order*.[4] Dominant local exchange carriers, such as Bell Atlantic and NYNEX, have similarly initiated damage actions—based solely on the D.C. Circuit decision—against their nascent competitors for alleged violations of Section 203.[5] These actions are merely the tip of the iceberg.

More broadly, the D.C. Circuit's ruling, and AT&T's aggressive litigation strategy based upon that ruling, have created a climate of confusion and uncertainty in the long-distance market. AT&T has assiduously cultivated doubt in the customers of its competitors as to the legality of their relationships with MCI and other long-distance providers, and has endeavored to use this uncertainty to intimidate prospective customers into refusing to deal

---

[3] *See American Telephone & Telegraph Co. v. MCI Communications Corporation*, No. 93-0283 (SSH) (D.D.C.); *American Telephone & Telegraph Co. v. Williams Telecommunications Group, Inc. et al.* No. 93-0284 (SSH) (D.D.C.); *American Telephone & Telegraph Co. v. Sprint Communications Company, L.P.*, No. 93-0285 (SSH) (D.D.C.).

[4] *See Telecommunications Reports*, Feb. 15, 1993 at 1, 2.

[5] *See Bell Atlantic Telephone Companies v. MFS Telecom, Inc., Atlantic Communications Enterprises, Baltimore Gas and Electric Company, Eastern Telelogic Corp., M H Lightnet, Inc., Penn Access Corp., Teleport Communications Group, Valleynet, and Local Area Communications Inc.*, FCC File Nos. E-93-13 to E-93-20; *New York Telephone Company, New England Telephone and Telegraph Company v. Teleport Communications New York*, FCC File No. E-93-88.

with MCI or other AT&T competitors.[6] Deferring review would permit this anticompetitive strategy largely to succeed.

The enormous legal and practical impact of the Court of Appeals' decision warrants immediate plenary review. For this reason, AT&T's suggestion that the case presents a garden variety dispute over the application of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), misses the mark.[7] This Court has repeatedly granted certiorari to review decisions misapplying *Chevron*—despite the absence of any conflict among the circuits—when the ruling threatened the foundations of important agency policies. *E.g.*, *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394 (1992); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 643-44 (1990). Plenary review in such circumstances is particularly necessary to ensure that reviewing courts respect "the proper roles of the political and judicial branches" and do not usurp the agency's appropriate policymaking functions on matters of substantial concern. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). *See also Chevron*, 467 U.S. at 866 ("federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do"). That justification is fully applicable here.

III. AT&T'S DEFENSE OF THE APPEALS COURT'S RULING CANNOT WITHSTAND SCRUTINY

AT&T argues that certiorari is unwarranted because the decision below was correct on the merits. But AT&T does not begin to come to grips with the serious errors of statutory construction which led the Court of Appeals to deny appropriate deference to the FCC's policy choices.

AT&T devotes virtually no effort to analyzing the text of Section 203. Nor does AT&T respond to the textual

---

[6] *See, e.g., Amicus Brief of Custom Network Services Users Group*, FCC File No. E-89-297 (May 21, 1993).

[7] *See* AT&T's Brief in Opposition at 12.

analysis set forth in MCI's petition for certiorari. *See* Petition at 15-23. That textual analysis demonstrated that the ordinary meaning of Section 203(b), which authorizes the Commission to "modify any requirement" of Section 203, is sufficiently capacious to justify the Commission's tariffing rule. In particular, AT&T does not deal with the undeniable fact that in ordinary usage the word "modify" can mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." Webster's Ninth New Collegiate Dictionary 763 (1988). As this Court has repeatedly made clear, the "existence of alternative dictionary definitions . . . each making some sense under the statute itself indicates that the statute is open to interpretation." *Boston and Maine Corp.*, 112 S. Ct. at 1402; *Sullivan v. Everhart*, 494 U.S. 83, 91-92 (1990).

Nor can AT&T explain away the language in Section 203(c), which plainly contemplates that the Commission will exempt carriers from tariff filing requirements under some circumstances. 47 U.S.C. § 203(c) ("No carrier, unless otherwise provided by or under the authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published"). AT&T argues that the remaining language of Section 203(c), which prohibits carriers from providing non-tariffed service, negates MCI's argument. *See* AT&T Brief in Opposition at 14. But AT&T's sweeping claim does not survive a close reading of the statutory language.

Section 203(c) prohibits carriers from departing from rates and charges "specified in the schedule[s] then in effect" or from extending special privileges not specified "in such schedule[s]." The "schedules" to which the remaining language of Section 203(c) refers are plainly the schedules that must be filed pursuant to the first sentence of Section 203(c). However, the first sentence of Section 203(c) expressly contemplates the possibility that the Commission will exempt some carriers from tariff filing requirements in some instances. The second

sentence of Section 203(c) thus must be understood to prohibit nontariffed service only in those instances where tariffs are required under the first sentence. AT&T's contrary interpretation—that no communications services can *ever* be provided absent filed tariffs—would completely nullify the effect of the "unless otherwise provided" clause.

Because the Court of Appeals' ruling cannot be sustained on the basis of a careful reading of the text of Section 203, AT&T seeks to divert attention by devoting the bulk of its analysis to a different statute—the Interstate Commerce Act ("ICA")—and to this Court's decision interpreting the ICA in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Indeed, AT&T argues that the ruling below "is compelled by this Court's decision . . . in *Maislin*," AT&T Brief in Opposition at 9, even though that decision played almost no role in the Court of Appeals' analysis. *See* Pet. App. 17a n.12.

Maislin, however, cannot dictate the result here because Section 203 of the Communications Act differs in critical respects from the statutory provisions at issue in that case. It is telling that AT&T, though claiming that the operative provisions of the two statutes are "worded indistinguishably,"[8] never quotes the critical statutory language. Section 10762 of the ICA, the provision at issue in *Maislin*, delegates to the ICC only a limited authority to "change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances." 49 U.S.C. § 10762(d)(1). Section 203(b) of the Communications Act states that the FCC may "in its discretion . . . modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). Thus, whereas Congress has plainly delegated to the FCC the broad authority to promulgate

[8] AT&T Brief in Opposition at 10.

"general order[s]" that make fundamental changes in Section 203's regulatory design in order to serve new regulatory goals, Congress limited the authority of the ICC to granting case-specific changes in tariff requirements "in particular instances."

Structural differences in the two statutory schemes also dictate that the statutes be interpreted differently. As the FCC explained in the *November 25th Report and Order*:

> the motor carrier analogs to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority in Section 203(b) applies, by its terms, to S. Ct. at 2271 (emphasis in oirginal]. Not only is and the prohibition against untariffed offerings (Section 203(c)).

Pet. App. 47a. Indeed, the Second Circuit has expressly rejected the argument that the FCC's modification power under Section 203(b) is no greater than that of the ICC under the ICA. *See AT&T v. FCC*, 503 F.2d 612, 617 (2d Cir. 1974).

Other indicia of congressional intent confirm that the two statutory schemes should not be treated identically in this context. As the FCC explained:

> the *Maislin* court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the requirements of Section 10761(a), thus "demonstrating that Congress is

> aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." [quoting *Maislin*, 110 S. Ct. at 2271 (emphasis in original)]. Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.

November 25th Report and Order, Pet. App. 47a-48a. Furthermore, because this Court has never held that Section 203 requires tariffing in all circumstances, *stare decisis* principles do not foreclose the agency's interpretation, as they did in *Maislin*. Thus, for these reasons, AT&T's facile analogy to *Maislin* is no substitute for close reading of the statutory language at issue—Section 203 of the Communications Act.[9]

The Court of Appeals' decision has effectively shackled the FCC to an anachronistic regulatory regime that is thwarting competition and harming consumer welfare in the long-distance market. Even the Court of Appeals "had no quarrel" with the policy objectives of the permissive tariffing rule, which has, according to the Commission, "played a substantial role in the development of competition in the interexchange market and the increased choices for customers with respect to carriers and prices." [10] It is one thing to require such a result when—as in *Maislin*—a statute enacted by Congress has left no

---

[9] There is no merit to AT&T's argument that TOCSIA is irrelevant to the meaning of Section 203. *See* AT&T Brief in Opposition at 15. Although TOCSIA was not intended to "*alter* the obligations, powers or duties of common carriers," 47 U.S.C. § 226(i) (emphasis added), neither MCI nor the FCC contend that TOCSIA altered the requirements of Section 203. Rather, TOCSIA confirms that Congress was apprised of and acted against the backdrop of the FCC's permissive tariffing rule. Thus, TOCSIA ratifies congressional agreement with the FCC's interpretation of Section 203(b).

[10] *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, FCC 93-103, February 19, 1993, at ¶ 10.

other choice, but it is quite another to reach the same result when the statute expressly delegates flexible powers to the regulatory agency to reorient the regulatory regime to serve new ends. There is no doubt that the Court of Appeals' decision is bad policy. As demonstrated, it is also bad law and should be reversed.

IV. THE ADMINISTRATIVE LAW ISSUE PRESENTED IN THE PETITION ALSO MERITS REVIEW

The United States agrees that the Court of Appeals' criticisms of the Commission were unwarranted, and that the Commission's procedural disposition of this case was proper. *See* United States' Brief in Opposition at 13. The United States nonetheless contends that plenary review of this issue is unwarranted because the Court of Appeals has simply precluded the Commission from dismissing a complaint while going forward with a rulemaking. This argument ignores the principle on which the Court of Appeals actually decided the case. The court required agency adjudicators to resolve challenges to an agency's statutory authority to promulgate a rule even if the party raising the challenge may properly be denied relief on a ground unrelated to the validity of the challenged rule. That principle imposes severe constraints on agencies seeking to resolve important public controversies appropriately.

CONCLUSION

The petition should be granted.

Respectfully submitted,

JOHN R. WORTHINGTON
DONALD J. ELARDO
FRANK W. KROGH
MCI TELECOMMUNICATIONS CORPORATION
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 872-1600

CHESTER T. KAMIN
MICHAEL H. SALSBURY *
ANTHONY C. EPSTEIN
DONALD B. VERRILLI, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for MCI Telecommunications Corporation

* Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

No. 92-1628

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Intervenors

And Consolidated Case No. 92-1666

BEFORE: Edwards, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary decision, the oppositions thereto and the reply, it is

ORDERED that the motion be granted and the order of the Federal Communications Commission (FCC) be summarily reversed. The merits of the parties' positions are so clear as to warrant summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1774 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*,

627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The decision of this court in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam